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REMARKS

Claims 1-21 are currently pending in the subject application and are presently under consideration. A clean version of all pending claims is found at pages 2-4. Favorable reconsideration of the subject patent application is respectfully requested in view of the comments herein.

**I. Rejection of Claims 1, 4-12, 17, and 18 Under 35 U.S.C. §102(a)**

Claims 1, 4-12, 17, and 18 stand rejected under 35 U.S.C. §102(a) as being anticipated by *Banga et al.* ("Measuring the Capacity of a Web Server"). It is respectfully submitted that this rejection should be withdrawn for at least the following reasons. *Banga et al.* does not teach or suggest *each and every element* of the claimed invention.

For a prior art reference to anticipate, 35 U.S.C. §102 requires that "*each and every element* as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950 (Fed. Cir. 1999) (quoting *Verdegaal Bros., Inc. v. Union Oil Co.*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987)) (emphasis added).

The present invention relates to utilizing a consistent server load, which can be adjusted and controlled, to determine server capacity. (See pg. 1, ln. 8-10). A user can specify a rate of a continual stream of requests sent from a client to a server. (See pg. 2, ln. 23-25). In particular, as recited in independent claim 1 (and similarly in independent claims 17 and 18), the subject invention *provid[es] a desired rate of requests by calculating an actual rate of requests being generated and adjusting the actual rate to within a predetermined range of the desired rate such that a continual rate of requests are provided to the server in order to facilitate determining server capacity*. *Banga et al.* fails to teach or suggest such claimed aspects of the subject invention. Instead, *Banga et al.* discloses a method for Web traffic generation that can generate bursty traffic, with peak loads that exceed the capacity of the server. (See Abstract).

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More particularly, one novel aspect of applicants' claimed invention is that a consistent and predictable load for a server can be established to determine the capacity of a given server. (See pg. 2, ln. 25-27). By way of example, utilization of a predetermined load at a consistent rate for the server facilitates determination of whether particular code and/or applications operate under load, whether any negative results are produced from the load, whether breaking points are produced from excessive load, and/or whether new applications and/or hardware have the capacity to serve the desired load. (See pg. 2, ln. 27 – pg. 3, ln. 2).

In particular, Banga *et al.* fails to teach or suggest *the client providing a desired rate of requests* as recited in independent claim 1 (and similarly in independent claims 17 and 18). Banga *et al.* instead discloses utilization of a set of client machines, where each client runs a number of S-Client processes. (See pg. 5, full paragraph 4). Each S-Client comprises a connection establishment process, which generates HTTP requests at a certain rate and with a certain request distribution. (See pg. 5, full paragraph 5). The techniques utilized in Banga *et al.* generate request rates beyond the capacity of the server. (See pg. 6, full paragraph 3). Since a set of client machines are each employing a number of S-Clients, Banga *et al.* discloses a technique similar to the concurrent connection model. One problem associated with the concurrent connection model is that it does not provide a controllable amount of stress for the server since each client operates independently. (See pg. 1, ln. 28-29). Furthermore, Banga *et al.* is silent regarding coordination of the requests from each of the S-Clients.

It is contended in the Office Action dated March 9, 2004 that "Banga discloses a client generating a desired rate of requests and measuring the request rates generated and determining the capacity of the server. See Page 9, Section 5.4 and Page 8, Left Column ('... 130 requests per second, which is the capacity of our server for this request size ... the request rate remains nearly constant at the capacity of the server')." (See pg. 3). Applicants respectfully disagree with such an assertion. Banga *et al.* notes that in a conducted experiment, the simple scheme generated no more than about 130 requests per second, which was the capacity for the server under the employed experimental conditions. (See pg. 8, full paragraph 3). Thus, the 130 requests per second are not a

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*desired rate of requests*; instead, the 130 requests per second are the maximum capacity for the server employed in the Banga *et al.* experimentation. Therefore, Banga *et al.* does not teach or suggest *the client providing a desired rate of requests*.

Furthermore, Banga *et al.* is silent regarding providing a desired rate of requests by *calculating an actual rate of requests being generated and adjusting the actual rate to within a predetermined range of the desired rate such that a continual rate of requests are provided to the server* as recited in independent claim 1 (and similarly in independent claims 17 and 18). Banga *et al.* merely discloses that a constant think time can be utilized to achieve a certain constant request rate from a S-Client. Banga *et al.* does not teach or suggest *calculating an actual rate of requests or adjusting the actual rate to within a predetermined range of the desired range*.

The Office Action dated March 9, 2004 contends that "determining the capacity of the web server by calculating an actual rate of requests being generated and adjusting the actual rate to within a predetermined range of the desired rate such that a continual rate of requests are provided to the server was inherently disclosed by the teachings of Banga." (See pg. 3). Applicants respectfully disagree.

In a patent case, under the doctrine of inherency, if an element is not expressly disclosed in a prior art reference, the reference will still be deemed to anticipate a subsequent claim if the missing element is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherent anticipation requires that the missing descriptive material is *necessarily present, not merely probably or possibly present*, in the prior art. *Rosco, Inc. v. Mirror Lite Co.*, 304 F.3d 1373, 64 USPQ2d 1676 (Fed. Cir. 2002) (emphasis added).

Applicants' representative respectfully submits that Banga *et al.* does not teach or suggest providing a desired rate of requests as noted *supra*. Moreover, providing a desired rate of requests by calculating an actual rate of requests being generated and adjusting the actual rate to within a predetermined range of the desired rate is not necessarily present in Banga *et al.* Thus, such an element is not inherent in Banga *et al.*

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In view of at least the above, it is readily apparent that *Banga et al.* does not anticipate or suggest the subject invention as recited in independent claims 1, 17, and 18 (and claims 4-12 which respectively depend there from). This rejection should be withdrawn.

**II. Rejection of Claims 13-16 Under 35 U.S.C. §103(a)**

Claims 13-16 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Banga et al.* ("Measuring the Capacity of a Web Server") in view of Yu (US 6,078,943). It is respectfully submitted that this rejection should be withdrawn for at least the following reasons. *Banga et al.* and Yu, individually or in combination, do not teach or suggest each and every element set forth in the subject claims.

Yu does not make up for the aforementioned deficiencies of *Banga et al.* with respect to independent claim 1 (which claims 13-16 directly or indirectly depend from). Yu does not teach or suggest a client ... providing a *desired rate of requests* by calculating an *actual rate* of requests being generated and *adjusting the actual rate to within a predetermined range* of the desired rate such that a continual rate of requests are provided to the server. Instead, Yu discloses utilizing an arbiter, which can assign clients to servers or assign a valid time interval to each mapping request based on network load and/or capacity parameters. (See abstract). Therefore, the subject invention as recited in claims 13-16 is not obvious over the combination of *Banga et al.* and Yu. Accordingly, withdrawal of this rejection is respectfully requested.

**III. Rejection of Claims 2 and 3 Under 35 U.S.C. §103(a)**

Claims 2 and 3 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Banga et al.* ("Measuring the Capacity of a Web Server") in view of Dantressangle (US 6,446,120). It is respectfully submitted that this rejection should be withdrawn for at least the following reasons. *Banga et al.* and Dantressangle, individually or in combination, do not teach or suggest each and every element set forth in the subject claims.

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Dantressangle does not make up for the aforementioned deficiencies of *Banga et al.* with respect to independent claim 1 (which claims 2 and 3 directly or indirectly depend from). Dantressangle does not teach or suggest a client ... providing a *desired rate of requests* by calculating an *actual rate* of requests being generated and *adjusting the actual rate to within a predetermined range* of the desired rate such that a continual rate of requests are provided to the server. Instead, Dantressangle discloses creating one or more virtual browsers at a client computer for transmitting commands to the server computer. (See abstract). Therefore, the subject invention as recited in claims 2 and 3 is not obvious over the combination of *Banga et al.* and Dantressangle. Accordingly, withdrawal of this rejection is respectfully requested.

**IV. Rejection of Claims 19-21 Under 35 U.S.C. §103(a)**

Claims 19-21 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Banga et al.* ("Measuring the Capacity of a Web Server") in view of what would have been obvious to one having ordinary skill in the art at the time the invention was made. It is respectfully submitted that this rejection should be withdrawn for at least the following reasons. *Banga et al.* does not teach or suggest each and every element of independent claim 18 (which claims 19-21 directly or indirectly depend from) as discussed *supra*. Therefore, the subject invention as recited in claims 19-21 is not obvious over *Banga et al.* Accordingly, withdrawal of this rejection is respectfully requested.

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**V. CONCLUSION**

The present application is believed to be in condition for allowance in view of the above comments. A prompt action to such end is earnestly solicited.

In the event any fees are due in connection with this document, the Commissioner is authorized to charge those fees to Deposit Account No. 50-1063.

Should the Examiner believe a telephone interview would be helpful to expedite favorable prosecution, the Examiner is invited to contact applicants' undersigned representative at the telephone number listed below.

Respectfully submitted,

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